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IN THE

Supreme Court of the United States

October Term, 1962

JOSEPHINE GOSS, *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*

HENRY C. MAXWELL, JR., *et al.*,

Petitioners,

—v.—

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, *et al.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1962

Josephine Goss, *et al.*,

Petitioners,

—v.—

The Board of Education of the City of Knoxville, Tennessee, *et al.*

Henry C. Maxwell, Jr., *et al.*,

Petitioners,

—v.—

The County Board of Education of Davidson County, Tennessee, *et al.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that writs of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the *Goss* case, on April 3, 1962, and the judgment of that Court entered in the *Maxwell* case on April 4, 1962.

Citation to Opinions Below

1. *Goss* case. The memorandum opinion of the United States District Court for the Eastern District of Tennessee (R. Goss 326a) reported at 186 F. Supp. 559, is printed in

the appendix hereto, *infra* p. 1a. The opinion of the United States Court of Appeals for the Sixth Circuit, printed in the appendix hereto, *infra* p. 26a, is reported in 301 F. 2d 164 (6th Cir. 1962).

2. *Maxwell* case. The first Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Middle District of Tennessee (R. Maxwell 114a), reported at 203 F. Supp. 768, is printed in the appendix hereto, *infra* p. 37a. The second Findings of Fact, Conclusions of Law and Judgment of that court (R. Maxwell 171a) is unreported and is printed in the appendix hereto, *infra* p. 57a. The opinion of the United States Court of Appeals for the Sixth Circuit, printed in the appendix hereto, *infra* p. 63a, is reported in 301 F. 2d 828 (6th Cir. 1962).

Jurisdiction

The judgment of the Court of Appeals in the *Goss* case was entered on April 3, 1962 (R. Goss, unnumbered page preceding opinion; appendix, *infra* p. 35a). The judgment of the Court of Appeals in the *Maxwell* case was entered on April 4, 1962 (R. Maxwell, unnumbered page preceding opinion; appendix, *infra* p. 67a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

I.

Whether petitioners, Negro school children seeking desegregation of the public school systems of Knoxville, Tennessee (*Goss* case), and Davidson County, Tennessee (*Maxwell* case), are deprived of rights under the Fourteenth Amendment by judicial approval of a provision in desegregation plans adopted by their local school boards,

which expressly recognizes race as a ground for transfer between schools in circumstances where such transfers operate to preserve the pre-existing racially segregated system, and which operate to restrict Negroes living in the zones of all-Negro schools to such schools while permitting white children in such areas to transfer to other schools solely on the basis of race.

II.

Whether the personal constitutional rights of three Negro plaintiffs in the *Maxwell* case were violated, where the courts below approved a desegregation plan for the school system which does not provide any nonsegregated education for these pupils at any time, and the courts refused to order their admission at all-white schools from which they had been excluded because of race, even though the school authorities made no showing of relevant administrative obstacles to their admission.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

These two cases involve the desegregation of the public schools of the City of Knoxville, Tennessee, and of Davidson County, Tennessee, an area adjacent to the City of Nashville. This single petition for two cases is filed under this Court's Rule 23(5) as the cases present an identical issue, e.g., the validity of identical provisions in desegregation plans adopted by the two school boards and approved by the courts below. The *Maxwell* or *Davidson County* case presents an additional issue relating to the denial of individual injunctive relief to certain of the Negro plaintiffs.

Both cases were brought by Negro public school pupils and their parents as class actions under Rule 23(a)(3), F. R. C. P., against the local school authorities seeking injunctive and declaratory relief to obtain desegregation in accordance with *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294.[1] In each case, jurisdiction of the District Court was invoked pursuant to 28 U. S. C., §§1331, 1343, 2201 and 2202, and 42 U. S. C., §§1981 and 1983, the cases involving alleged denials of rights under the Fourteenth Amendment. In both cases the school authorities acknowledged by their answers that they were continuing to operate racially segregated public school systems. After directions from the trial courts to present desegregation plans (R. Goss 36a; R. Maxwell 62a), both boards adopted plans to desegregate one school grade each year over a twelve year period, beginning with the first grade, in 1960 in Knoxville and in 1961 in Davidson County. (For text of plans see: R. Goss 38a; Maxwell 39a.) While there were differences in wording, the two plans were substantially the same. Both contained provisions for rezoning of schools without reference to race, and for a system of transfers.

The transfer rule, which is at issue on this petition, provided that pupils could obtain transfers from the schools in their zones of residence to other schools upon request in certain cases. The Knoxville plan provided:

> 6. The following will be regarded as some of the valid conditions to support requests for transfer:
>
> a. When a white student would otherwise be required to attend a school previously serving colored students only;

[1] The *Goss* case was filed December 11, 1959 in the District Court for the Eastern District of Tennessee (R. Goss 5a). *Maxwell* was filed September 19, 1960 in the Middle District of Tennessee (R. Maxwell 7a).

b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race (R. Goss 40a).

The transfer provision adopted by Davidson County was the same except for one or two words not affecting the meaning (R. Maxwell 70a).

Plaintiffs filed written objections to both plans including specific objections to the above-quoted transfer rule (R. Goss 41a-43a; R. Maxwell 72a-76a). The District Courts in both cases held hearings to consider the adequacy of the plans at which the parties presented evidence.

In the *Goss* case, the District Court found the plan acceptable and approved it in all respects, except that it required the school board to re-study and re-submit a plan relating to an all-white vocational school offering technical courses not available to Negro students. On plaintiffs' appeal to the Sixth Circuit in the *Goss* case, the Court of Appeals modified this judgment "insofar as it approved the board's plan for continued segregation of all grades not reached by its grade a year plan," and remanded, instructing the District Court "to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation" (301 F. 2d at 169). Thus, the Court sustained one of plaintiffs' arguments saying the "evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision" (301 F. 2d at 167). The court affirmed the approval of the plan as to the other features, including the transfer provision, stating that this

approval was "subject to it being used for proper school administrative purposes and not for perpetuation of segregation" (301 F. 2d at 168). Plaintiffs' requests for individual injunctive relief requiring their admission in certain white schools were disposed of by the statement that the request was moot as to some pupils who had graduated from school, and that after the school board complied with the Court of Appeals' order to accelerate desegregation, this question might become moot as to the others (301 F. 2d at 168). As indicated above, petitioners in the *Gass* case seek review of the Sixth Circuit's decision only as to its approval of the racial transfer plan.

In the *Maxwell* case the District Court disapproved the school board's twelve year plan and modified it to require that the *first four grades* be desegregated as of January 1, 1961, with an additional grade to be desegregated each September thereafter until all grades were covered. The District Court approved the racial transfer provision and also refused injunctive relief to several plaintiffs who sought admission to white schools nearer their homes as exceptions to the plan in higher grades that were still segregated. On plaintiffs' appeal involving these last mentioned two issues, the Sixth Circuit affirmed the approval of the transfer plan and the denial of injunctive relief as to three plaintiffs who sought individual admissions. Petitioners seek review here of both issues decided by the Court of Appeals in the *Maxwell* case.

Evidence and Holdings:

***Goss* Case**

The major part of the testimony in the record relates to the issue presented by the request for a twelve year delay in desegregation, and since no review of the Sixth Circuit's action on this matter is sought, this factual summary is limited to matters bearing on the transfer plan. The evidence touching on the transfer plan consisted of testimony by school board members as to its meaning, their understanding of its likely effect, and the reasons for the plan. There was also testimony by a school administrator as to prior transfer procedures, and several affidavits and exhibits were filed by plaintiffs in support of their motion for new trial which reflect school board action establishing transfer procedures after the trial court's approval of the plan.

The school board president, Dr. Burkhart, testified that the provision for transfers based on race was adopted out of concern for "the orderly education of our students, both white and colored, in an effort to make available to the community the best facilities and instructional facilities that we can under the least possible circumstance which might be harmful" (R. Goss 108a); that the board thought it might be "harmful" to a certain number of white students to go to school with Negroes and also "it might be harmful to some of the colored students to go with white students if they did not want to" (R. Goss 108a). He said the basis for this feeling was:

> The fact that we are talking about two separate races of people, with different physical characteristics, who have not in our community been very closely associated in many ways, and certainly not in school ways. And

there would be a sudden throwing together of these two races which are not accustomed to that sort of thing. Either one of them might suffer from it unless we took some steps to try to decrease that amount of suffering or that contact which might lead to that in case it did occur (R. Goss 108a).

The witness stated that he did not necessarily refer to physical harm but was more concerned with "mental harm" (R. Goss 109a). With regard to the expected operation of the transfer rule, the school board president testified that he did not know the mechanics as to how pupils would be notified of their new school zones (R. Goss 115a). He further testified:

Q. I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively? A. We doubt that they will.

Q. As a matter of fact, none have remained in the City of Nashville, have they? A. I don't know. All I can do to keep up with the City of Knoxville.

Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not? A. Yes, sir.

Q. And if he applied for transfer out of his zone to a school which had been formerly serving white students only, then his application would be denied under this plan, would it not, sir? A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.

* * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of this plan? A. Yes, sir (R. Goss 118a).

Another board member, Dr. Moffett, acknowledged that the transfer provisions "at least give the opportunity" to perpetuate segregation insofar as they are availed of by the students or parents (R. Goss 205a).

Mr. Marable, a school administrator in charge of handling transfer requests, stated that under the system used before this plan was approved, when parents request transfers he investigates the requests and gets the views of the principals concerned and determines if the family has a "valid reason" (R. Goss 264a-265a); that the school board "leaves that up to me," (*Ibid.*); that he did not know what the board's written rules on transfer provided (*Ibid.*); that "I just know I have handled it so many years on my own, and so far I haven't stuck my neck out on it" (R. Goss 266a); "that each case is individual. That has to be handled that way. Could not have a rule" (266a); that an example of a "valid" reason would be where a child's mother taught at a school and wanted the child with her because she had nowhere to leave it and the school had room and the principal agreed (R. Goss 267a); that generally transfers were granted for "hardship cases and convenience" (R. Goss 267a).

After the trial court approved the plan, the school board adopted a resolution providing for administration of the provisions as follows: "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended" (R. Goss 350, 352a).

The District Court opinion did not discuss the transfer plan issue in its memorandum opinion, although during the trial the court indicated that it regarded itself as bound by the Sixth Circuit's prior approval of an almost identical provision in the Nashville, Tennessee school case (R. Goss 119a). See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209, 228 (6th Cir. 1959).

The Court of Appeals' holding with respect to the transfer plan in the *Goss* case was as follows:

> The transfer feature of the plan comes under sharp criticism of the plaintiffs. They claim that the operation of such a plan will perpetuate segregation. We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. It is in the same category as the pupil assignment laws. They are not inherently unconstitutional. Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, D. C. N. D. Ala., affirmed, 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. They may serve as an aid to proper school administration. A similar transfer plan was approved by this Court in Kelley v. Board of Education of City of Nashville, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924, 80 S. Ct. 293, 4 L. Ed. 2d 240. We adhere to our former ruling with the admonition to the board that it cannot use this as a means to perpetuate segregation. In Boson v. Rippy, supra, the court said, 285 F. 2d at p. 46, the transfer feature "should be stricken because its provisions recognize race as an absolute ground for the transfer of students, and its application *might* tend to perpetuate racial discrimination." (Emphasis added.) This transfer provision functions only on request and rests with the students or their parents and not with the board. The

trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands (301 F. 2d 164, 168).

***Maxwell* Case**

With regard to the transfer plan, the Superintendent of Schools agreed that the effect of the rule is to permit a child or his parents "to choose segregation outside his zone but not to choose integration outside of his zone" (R. Maxwell 91a); that the provision was identical to that in the Nashville plan; and that as it operated in Nashville and was intended to operate in Davidson County, white pupils were not actually required to first go to the Negro schools in their zones and then seek transfers out, and no Negro pupils who did not affirmatively seek a transfer to an integrated school were assigned to one (R. Maxwell 91a-92a).

Dr. Eugene Weinstein, a professor at Vanderbilt University in Nashville, testified about a survey of the attitudes of Negro parents in Nashville who had a choice of whether to send their children to desegregated schools. He indicated that the most frequent factor influencing those who did not send their children to white schools was an unwillingness to separate several children in a family where they had older children not eligible for desegregation under the grade a year plan. He said the experience in Nashville indicated "mass paper transfers of Whites back into what is historically the White school, of Negroes remaining in what is historically the Negro school"; and that the transfer provisions tend to keep the system oriented toward a segregated system with token desegregation (R. Maxwell 101a-102a).

Six of the plaintiffs in this case reside nearer to all-Negro schools than to white schools (R. Maxwell, 116a-Finding No. 5).

At a further hearing held on plaintiffs' motions following the initial approval of the plan with modifications, the evidence indicated that under the new zones adopted under the plan, in the first four grades, there were 288 white children in the Negro school zones and 405 Negro children in the zones of the white schools (R. Maxwell 150a). The school authorities sent notices to the parents of these children asking them to indicate within three days whether they requested permission for the children to stay at the school presently attended or requested permission for a "transfer" to the newly zoned school (R. Maxwell 142a-145a). Of this group, only fifty-one pupils, all of them Negroes, asked to attend the school in the new zones (R. Maxwell 165a).

As previously indicated the District Court approved the transfer feature of the plan (R. Maxwell 131a-132a). On appeal the Sixth Circuit also approved this provision on the authority of its decision in *Goss* (301 F. 2d at 829).

Three of the Negro plaintiffs (Henry C. Maxwell, Jr., Benjamin G. Maxwell and Deborah Ruth Clark) pressed their claims for individual injunctive relief in both courts below. In the trial court they sought this relief by motion for preliminary injunction, at the trial and by post trial motions for new trial and other appropriate relief. Relief was denied on each occasion.

The trial court found on undisputed evidence that these children (among others) had applied to certain white schools for the September 1960 term, that they were refused admission solely on account of their race or color and that if they had been white children they would have been admitted to the white schools to which they applied (R. Maxwell 115a-116a, Finding No. 4). The Superintendent indicated that admission of these pupils who sought individual relief (there were six originally) would not have caused any great administrative problems (R. Maxwell 53a),

and that: "I wouldn't say there wouldn't be any administrative problem. If we had our children and teachers ready to accept them, maybe there wouldn't be too much of a problem" (R. Maxwell 54a). When asked what administrative problems their admission would create, the Superintendent mentioned only "friction" and the possibility of "bloodshed" or "fights" (R. Maxwell 54a, 56a-60a), based upon his reading of what occurred in Little Rock (R. Maxwell 57a, 93a-94a). He stated that these children could be accommodated "as far as room is concerned" but that he couldn't accept them without accepting all who might apply (R. Maxwell 82a).

The Court denied plaintiffs' request that they be admitted as exceptions to the plan stating in its second opinion dated January 24, 1961 (R. Maxwell 173a):

> With respect to the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr. and Benjamin Grover Maxwell, to be admitted to schools as exception to said desegregation plan, the Court is of the opinion that to grant such exceptions would be in effect to invite the destruction of the very plan which the Court has held is for the best interest of the school system of Davidson County. It is not a plan which is designed to deny the constitutional rights of anyone. It is a plan which is designed to effect an orderly, harmonious, and effective transition from a racially segregated system to a racially non-segregated system of schools, taking into account the conditions existing in this particular locality. And the Court cannot see how these individual plaintiffs who brought this action are or would be entitled to any different treatment from any other children who attend the schools of Davidson County and are members of the class represented by the plaintiffs.

See also the opinion of November 23, 1960 (R. Maxwell 131a).

The Court of Appeals affirmed stating at 301 F. 2d 829:

> The same questions were decided in our opinion in Goss et al. v. Board of Education of City of Knoxville, et al., 6 Cir., 1962, 301 F. 2d 164.
>
> In that case we said, on the first question: "As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan."

In *Goss, supra* at 301 F. 2d 168, the Court had gone on to state:

> We think Judge Taylor was correct in denying injunctive relief and as he so eloquently said: "Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there."

REASONS FOR GRANTING THE WRITS

I

With regard to the racial transfer plan, there is a conflict among the circuits, the decisions below are in conflict with principles established by this Court, and the issue is of widespread importance.

There is a clear and direct conflict between the opinion of the Court of Appeals for the Fifth Circuit in *Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir. 1960) and the opinions of the Sixth Circuit in the *Goss* and *Maxwell* cases as well as that court's opinion in *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209 (6th Cir. 1959), cert. den. 361 U. S. 924. In the *Boson* case the Fifth Circuit held that an identical transfer provision was unconstitutional, and expressly recognized that its holding was in conflict with the *Kelley* case, *supra*, stating:

> We fully recognize the practicality of the argument contained in the opinion of the Sixth Circuit holding that similar provisions are not unconstitutional.
>
> • • • • •
>
> Nevertheless with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school (285 F. 2d at 48).

The Fifth Circuit went on to say that "the transfer feature should be stricken because its provisions recognize race as an absolute ground for transfer of students, and its application might tend to perpetuate racial discrimination" (*Ibid.* at 47). In the *Goss* opinion 301 F. 2d at 168), the

court, after emphasizing the word "might" in the last quoted passage, went on to mention the fact that the transfer provision functions only on request and rests with the students or parents, and said that the matter might be safely left in the hands of the trial judge. Petitioners submit that this is no distinction at all between the *Goss* case and *Boson* v. *Rippy, supra,* for in *Boson* also the transfer provision functioned only at parents' request and the court was required to retain jurisdiction. The Sixth Circuit's qualification of its approval of the plan affords no ascertainable safeguards. The Court states that its approval is "subject to its being used for proper school administrative purposes and not for perpetuation of segregation." But the court did not indicate how racial transfers might be used for proper administrative purposes, or how the plan could operate other than to perpetuate segregation. Perhaps this puzzling reference is to the perpetuation of *complete* racial segregation in the entire school system. In any event it is self evident that to the extent that the transfer rule is availed of by parents it will work to preserve the pre-existing pattern of segregation. Obviously transfers of white children from Negro to white schools, and of Negro children from white to Negro schools, will have this effect. It is equally clear that the plan does not provide for transfers on the basis of race to promote desegregation.

Similarly the Sixth Circuit's comparison of this provision with pupil assignment laws which are "not inherently unconstitutional" but may be applied so as to "become a violation of constitutional rights" is not apt. The pupil assignment laws upheld in such cases as *Shuttlesworth* v. *Birmingham Board of Education,* 162 F. Supp. 372 (N. D. Ala. 1958), affirmed on limited grounds, 358 U. S. 101; *Dove* v. *Parham,* 271 F. 2d 132 (8th Cir. 1959), and *Carson* v. *Warlick,* 238 F. 2d 724 (4th Cir. 1956), conspicuously did *not* mention race as a basis for determining transfers.

When race has been found to be a consideration affecting transfers in the pupil assignment law cases, the appellate courts have uniformly held the pupil assignment laws to be invalidly applied. See for example: *Norwood* v. *Tucker*, 287 F. 2d 798 (8th Cir. 1961); *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Green* v. *School Board of the City of Roanoke, Va.*, —— F. 2d —— (4th Cir. No. 8534, May 22, 1962); *Marsh* v. *County School Board of Roanoke County, Va.*, —— F. 2d —— (4th Cir. No. 8535, June 12, 1962); *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72 (4th Cir. 1960). The pupil assignment cases support the view that the racial transfer is invalid, since the only manner in which the rule can be invoked is on the basis of race.

The Sixth Circuit's holding then furnishes no safeguards, or real limitations on use of the transfer rule. There is no indication that the Court regarded the rule as an interim or temporary transitional device to be discarded at a later date, nor is there any indication that the trial court so viewed it. Thus retention of jurisdiction has no particular significance on this point.

While the court below discussed plaintiffs' argument that the rule would perpetuate segregation in the Negro schools, there is no discussion of plaintiffs' argument that the rule discriminates against Negro pupils living near the Negro schools. This discrimination is very plain and simple. A Negro child living in the zone of an all-Negro school must go to that school; his white neighbors are permitted to transfer out of the zone and attend an all-white or predominantly white school. This valued privilege to transfer out of a school zone is thus conferred or denied solely on the basis of the race of the pupil. This is exactly the type of racially discriminatory application of transfer rules condemned in each of the pupil assignment law cases cited above.

It is interesting to compare this device with that revealed in *Taylor* v. *Board of Education of City of New Rochelle*, 191 F. Supp. 181, 185; 195 F. Supp. 231 (S. D. N. Y. 1961), app. dismissed 288 F. 2d 600, affirmed 294 F. 2d 36 (2nd Cir. 1961), cert. den. 368 U. S. 940, where the courts went even a step beyond condemning a practice similar to that here. In *Taylor* the school officials had at one time followed a rule allowing white children to transfer out of a Negro school zone, but abandoned this practice before the suit was brought. The Court held that the school board was nevertheless still obligated to relieve the segregated situation which continued because of this prior practice and a prior gerrymandering of zone lines. *A fortiori* from the *Taylor* decision, a present practice of allowing white pupils to transfer out of a Negro school zone on the basis of race is unlawful.

However, here the defendants point to the correlative provision of the plan which effects a similar disparity in treatment on a racial basis in white school zones as justifying that in the Negro zones. They argue that since a white child in a white area cannot transfer, but a Negro there can transfer to a Negro school, the reciprocal discriminations "balance out" as it were. But this symmetrical inequality of treatment on a racial basis ignores the personal nature of the Fourteenth Amendment rights to racially nondiscriminatory treatment by school officials. The Negro pupil denied a transfer granted to his white neighbors is no less aggrieved by this because in other areas of the city white pupils are denied options given to Negroes, particularly where this denied "privilege" (to attend the all-Negro school) is one that few white persons in the community desire in any event.

The problem is very much like that dealt with in *Shelley* v. *Kraemer*, 334 U. S. 1, where it was argued that a racial

restrictive covenant enforced against Negroes was valid, since the courts would enforce similar covenants against white persons. After observing that it knew of no case of such a covenant against white persons, the Court said at 334 U. S. 22:

> But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. [Footnote citing McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151, 161; Missouri ex rel. Gaines v. Canada, 305 U. S. 337; Oyama v. California, 332 U. S. 633.] It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

It is submitted that the ruling of the Fifth Circuit in *Boson* v. *Rippy*, 285 F. 2d 43, 47-50 (5th Cir. 1960) is in accord with this Court's determination in *Brown* v. *Board of Education*, 347 U. S. 483 that racial classifications in public education violate the Fourteenth Amendment. Such racial classifications are "not reasonably related to any proper governmental objectives." *Bolling* v. *Sharpe*, 347 U. S. 497, 500.

This transfer plan violates these principles by classifying schools both by reference to the race of the pupils previously attending them, and by reference to the race of the majority of the pupils in each school. It also classifies pupils by race in determining their eligibility to transfer. Such racial classifications are presumptively arbitrary. Cf. *Korematsu* v. *United States*, 323 U. S. 214, 216; *Hirabayashi* v. *United States*, 320 U. S. 81, 100. The defendants

have not offered any theory to justify these racial classifications except that they accommodate those who desire segregation (R. Goss 109a).

It is submitted that this does not satisfy the defendants' obligation under *Brown, supra,* and *Cooper* v. *Aaron,* 358 U. S. 1, 7 "to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system."

The public importance of the issue presented by this racial transfer plan has increased as its use has become widespread. When the issue was first brought to this Court's attention in 1959 in the *Kelley* case, it was a new issue and involved only Nashville, Tennessee. Nevertheless, at that time the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan, indicated that they:

> . . . although cognizant that the District Court retained jurisdiction of the action during the transition, would grant the petition for certiorari limited to the fourth question: whether the provisions of paragraphs four and five of the plan are constitutionally invalid for the reason that they "explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial discrimination" (361 U. S. 924).

Since *Kelley,* this plan has been adopted in numerous communities, and the courts have expressed divergent views. In addition to *Boson* v. *Rippy, supra,* and the two cases involved here, see *Mapp* v. *Board of Education of City of Chattanooga, Tenn.,* 203 F. Supp. 843 (E. D. Tenn. 1962) which held such a transfer plan *invalid* a few days before *Goss,* saying: "Reason would appear to favor the Boson decision. Not only is the proposed transfer plan of ques-

tionable legality, but it is the opinion of the Court that any transfer plan, the express or primary purpose of which is to prevent or delay the adoption or implementation of the plan of desegregation herein developed, should not be approved. The transfer plan proposed by the Board of Education would at the very least greatly delay the implementation of a plan already gradual in its provisions, if not prevent its ever becoming fully adopted." See also *Jackson* v. *School Board of City of Lynchburg, Va.*, 203 F. Supp. 701, 704-706 (W. D. Va. 1962) (held plan valid; appeal pending); *Thompson* v. *County School Board of Arlington County, Va.*, unreported (E. D. Va. March 1, 1962) (excerpts in 30 U. S. Law Week 2446; held plan valid, refused to retain jurisdiction, vacated injunction; appeal pending). The Court of Appeals for the Fourth Circuit now has this issue under advisement ~~in a~~ case argued June 12, 1962, *Dillard* v. *School Board of City of Charlottesville, Va.*, 4th Cir. No. 8638.

The racial transfer device has thus become a significant and effective method for limiting desegregation. Its use insures that the traditional all-Negro schools will remain all-Negro, even after every grade is covered in a grade-by-grade plan. This has been the uniform experience with this device. The transfer rule is thus a potent device for partially negating this Court's decision in *Brown* v. *Board of Education*.

This Court has reviewed but one school desegregation case, on plenary hearing, since *Brown*, e.g., *Cooper* v. *Aaron*, *supra*, nearly four years ago. In the seven years since the second *Brown* decision school segregation litigation has been extensive. Progress in desegregation has been statistically insignificant in some of the states where there has been the most litigation. The Southern School News reported in May 1962 (Volume 8, No. 11, p. 1) that only 7.6%

of the Negro students in 13 southern states and the District of Columbia were in school with white pupils,[3] that there has been an increase of only 1.6% in the past two years[4] and that the District of Columbia and six border states have the greatest proportion of these desegregated Negro students. It is submitted that a review of this case will enable the Court to scrutinize one of the principal methods being used to preserve segregation against legal attacks.

II.

The decision below in the *Maxwell* case denying injunctive relief to three Negro plaintiffs who sought admission to white schools in grades not reached by the plan is in conflict with principles established by this Court and is of public importance.

Petitioners, Henry C. Maxwell, Jr., Benjamin G. Maxwell and Deborah Ruth Clark, have been admittedly denied admission to schools they otherwise would be entitled to attend under the segregation policy. The courts below recognized that this denial of admission infringed their rights under the Fourteenth Amendment, but denied relief on the ground that exceptions would "destroy" the grade-by-grade plan.

It is submitted that the courts below failed to give adequate recognition to the principle stated by this Court in the second *Brown* decision, where it said:

> At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis (349 U. S. at 300).

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[3] The Tennessee figure was reported at .750%, representing 1,167 students in 17 communities. Southern School News, May 1962, Vol. 8, No. 11, pp. 1, 9.

This Court had, of course, previously emphasized the personal nature of the rights involved. *Sweatt* v. *Painter*, 339 U. S. 629, 635; *Sipuel* v. *Board of Regents*, 332 U. S. 631, 633; *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

In terms of all of the factors mentioned by the second *Brown* decision, the admission of these plaintiffs was plainly shown to be practicable when their request was made. The Superintendent of Schools justified their exclusion only in terms of apprehended "friction" and "bloodshed" arising out of opposition to desegregation. These factors are plainly legally irrelevant in even supporting delay of plaintiffs' rights, and certainly cannot justify abandoning them altogether. *Brown* v. *Board of Education*, 349 U. S. 294, 300; *Cooper* v. *Aaron*, 358 U. S. 1, 7, 16; *Buchanan* v. *Warley*, 245 U. S. 60, 81.

The statement by the Court of Appeals that a multiplicity of individual suits for such admissions could thwart the smooth working of the plan (301 F. 2d at 829) rests the decision of the case before the court on problems which might arise out of a possibility which has not yet occurred and might never occur. Here only three persons seek exceptions to the plan. If larger numbers sought similar privileges, a different administrative problem might be presented and could be dealt with accordingly. There was room for the plaintiffs in the schools they sought to attend. The fact that later applicants might present an overcrowding problem should not bar these applicants. The Fourth Circuit recently rejected such a contention in *Marsh* v. *County School Board of Roanoke County, Va.*, —— F. 2d —— (4th Cir. June 12, 1962), saying "the fear that applications which have not yet materialized might create a serious crowding problem is no reason for rejecting applicants before the problem has arisen."

The Third Circuit in *Evans* v. *Ennis*, 281 F. 2d 385, 393 (3rd Cir. 1960), rejected a grade-a-year plan, stating as one of its reasons the fact that the plaintiffs were deprived "of any chance whatever of integrated education." *Evans* v. *Ennis, supra*, required that pupils who actually sought desegregation be granted relief, though it permitted complete elimination of the dual system to proceed over a longer period. Similarly the Fourth Circuit has approved decisions granting individual litigants relief as exceptions to general desegregation programs in *Board of Education* v. *Groves*, 261 F. 2d 527, 529 (4th Cir. 1958); *Moore* v. *Board of Education*, 252 F. 2d 291 (4th Cir. 1958). See also *Pettit* v. *Board of Education*, 184 F. Supp. 452 (D. Md. 1960); and cf. *Jackson* v. *School Board of City of Lynchburg, Va.*, 201 F. Supp. 620 (W. D. Va. 1961). *Cf.* also the concurring opinion by Justice (then Judge) Stewart in *Clemons* v. *Board of Education*, 228 F. 2d 853, 859-860 (6th Cir. 1956).

The importance of a nonsegregated education to these plaintiffs is indeed reemphasized by a finding in the record that on an overall basis Negro children who have not attended desegregated schools have achievement levels substantially below white children and that this disparity in Davidson County "increases in direct proportion to the grade of the child" (R. Maxwell 126a-127a). The trial court regarded this as support for a gradual desegregation program. However, it obviously demonstrates that the longer Negro pupils are kept in segregated schools, the more their disadvantaged situation is aggravated.

The trial court's suggestion (173a) that it would be discrimination in favor of the plaintiffs if they were granted exceptions is extremely ironic, since the question involved is whether a court of the United States shall enforce personal constitutional rights to the equal protection of the

laws. The enforcement of the rights of those who come to court to secure them is traditional in our system of law. The theory adopted by the Sixth Circuit which relegates plaintiffs to a vicarious enjoyment of constitutional rights, is the innovation. It is not the "accident of fate," but the action of the school board, which denies plaintiffs' rights.

The trial court's retention of jurisdiction does not presage any possibility that exceptions might be considered in the future, despite the puzzling statement that plaintiffs' rights were merely "postponed." The Court of Appeals made clear that it considered their rights to have been properly "subordinated for the good of many" (301 F. 2d at 829).

This case represents a serious departure from the doctrine of the *Brown* case that individual plaintiffs' rights must be enforced "as soon as practicable." Here there were no circumstances which might even justify delay in enforcement as to these plaintiffs. Thus the case presents a publicly important issue, touching as it does, the enforcement of basic constitutional rights.

CONCLUSION

WHEREFORE, petitioners respectfully pray that the writs of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinions and Judgments in *Goss* Case

District Court Memorandum Opinion

Filed: August 19, 1960

This suit was filed by a number of negro children and their parents or guardians against the Members of the Board of Education of the City of Knoxville, namely, John H. Burkhart, Robert B. Ray, Roy E. Linville, Charles R. Moffett and Mrs. Gilmer H. Keith, and also the Board of Education of the City of Knoxville, the School Superintendent and the persons who were either actual principals or acting principals of East High School, Park Junior High School, Mountain View Elementary School and Fulton High School in Knoxville, Tennessee, the Supervisor of Child Personnel Department, said defendants being the administrative officers having general supervision and control of the public schools of Knoxville, asking for an injunction restraining defendants from operating a compulsory racially segregated school system in Knoxville and for a declaratory judgment, declaring the rights of plaintiff school children to be admitted to the public schools of Knoxville on a racially unsegregated basis and without discrimination on account of race or color.

The defendants by answer admitted that the public schools were operated on a segregated basis, as had been the practice and custom in the Knoxville area since 1870.

The answer asserted that "Two duties of these defendants, have sharply clashed, the one to obey the Constitution of the United States as so recently interpreted, the second to honor and respect an allegiance to our community and its members which incorporates in its very fabric a careful protection of our cherished institutions. More particularly, there is the absolute compulsion to seek ever for efficient, undisturbed and continuous schooling, unmarred by the possibility of interruption from drastic unpopular change. The defendants have simply discharged

the responsibilities of their offices in the only way that a proper reconciliation of conflicting allegiances has permitted . . ."

In short, the position of the Members of the School Board was that the interest of the community demanded postponement of desegregation until a plan could be perfected that would fit the needs of the community.

The suit arises under the Constitution of the United States and seeks the enforcement of rights guaranteed by the Fourteenth Amendment. Jurisdiction is derived from Title 28 U. S. C., Sec. 1343. The Court has jurisdiction of the parties and the subject matter. Title 28 U. S. C. 1331, 2201, 2202.

The action was filed as a class action under Rule 23(a) (3) of the Federal Rules of Civil Procedure.

The parties stipulated many facts, many of which are included below in this memorandum opinion.

Plaintiffs are negroes and are citizens of the United States, State of Tennessee and are residents of and domiciled in the City of Knoxville, Knox County, Eastern Division of Tennessee. Adult plaintiffs, not applicants, are either parents or guardians of the infant plaintiffs who are applicants.

All infant plaintiffs are attending public schools operated by the City of Knoxville, except that infant plaintiffs, Blake, Robinson, Jr., Riddle and Thompson, graduated from Austin High School on May 31, 1960.

Defendant, Board of Education, operates the public elementary and secondary schools, including those now designated as Mountain View Elementary, Park Junior High, East High and Fulton High Schools, exclusively for the education and use of white children residing in the City of Knoxville. These schools are attended exclusively by white children and admittance thereto was denied to the

infant plaintiffs and other negro children similarly situated who reside in the areas proximately surrounding said schools, solely because of their race or color. The defendant, Board of Education, maintains and enforces a policy and practice of compulsory racial segregation throughout the Knoxville School System.

Fulton High School, in addition to providing the usual high school courses, affords adequate facilities to provide technical and vocational instruction on a modern basis by grades. It is used by white children residing in the City of Knoxville, Tennessee who desire and are qualified to take said technical and vocational instruction, irrespective of their place of residence in the City of Knoxville; but the facilities afforded by Fulton High School are denied by defendants to infant plaintiffs who desire instruction, and other negro children similarly situated, residing in the City of Knoxville, irrespective of their place of residence in the City of Knoxville, solely on account of their race or color.

The School System of Knoxville consists of 40 schools, total enrollment of 22,448 students, of whom 4,786 are negro students and 17,662 are white students, as at the close of school June, 1960. On that day, the Knoxville School System employed a total of 879 principals and teachers, 712 of whom are white persons and 167 are negroes.

The enrollment in the first grade of the Knoxville Public School System was approximately 2,314 students, and 2,500 are anticipated in the first grade for the year beginning 1960, of whom approximately 1,900 are anticipated to be white students and 600 negro students. Teachers employed for the first grade, year 1959-1960 of the Knoxville School System numbered 84, of whom 63 were white persons and 21 were negroes.

Insofar as quality of teaching is concerned, the Public Schools of Knoxville operated for negro students are substantially equal to the Public Schools of Knoxville operated for white students.

There is no difference in the salary schedules of negro teachers and white teachers.

The physical facilities for white and negro students are excellent.

Beginning with the year 1954 and continuing from time to time to the filing of the present suit, negro parents and children and other citizens have petitioned the School Board and appeared before the School Board and asked the Board to take immediate action towards desegregation of the Public School System.

On June 16, 1955, the Attorney General of Tennessee rendered an opinion to the State Commissioner of Education, and through him to the Superintendent of Education for the State of Tennessee, in which he stated in substance that under the Tennessee Code it is the responsibility of each local school board to determine for itself the way in which it will meet the problems of desegregating the schools under its jurisdiction. As a result of this opinion, together with the decision of the United States Supreme Court in the *Brown* Case, the Board in a special meeting held on August 17, 1955 resolved that it would act in good faith to implement the constitutional principles declared in the *Brown* decision as applied to public schools, and would make a prompt and reasonable start towards those objectives.

The Superintendent and his administrative Staff were instructed to develop a specific plan of action leading to the gradual integration of the Knoxville public schools.

District Court Memorandum Opinion

At a special meeting held on August 17, 1955, following the second *Brown* decision of May 31, 1955, the Board reaffirmed its policy to work towards gradual desegregation.

Two Members of the Board and two Members of the supervisory Staff visited the integrated public schools of Evansville, Indiana in July, 1955 to study desegregation in those schools.

On August 17, 1955 the Board directed the Superintendent and his Staff to develop a plan of action leading to the gradual integration of the public schools and to that end the Superintendent and his Staff began holding meetings for the purpose of further exploring the subject. As an outgrowth of these meetings, the study council, composed of all principals, school administrators and supervisors (both white and negro) and the Superintendent of Schools, was formed for the purpose of exploring and studying plans and procedures in school desegregation. This study council held an additional series of meetings and formulated several possible plans for desegregation, eight of which were presented to the Board for the Board's study. These study groups continued with their meetings the remainder of 1955 and during the year 1956.

In the meeting of May 11, 1956, the Board announced that each of the eight plans for desegregation had been carefully reviewed by the Board but that the Board did not feel at that time that desegregation of the Knoxville public schools could be successfully put into operation. Three reasons were given for such action:

(a) Segregation should not be attempted until the school building program is further advanced.

(b) The Members of the Board do not believe that the people of both races are ready for a definite plan for desegregation and that further delay would lessen the likeli-

hood of unpleasant incidents which have occurred in some places where desegregation has been inaugurated.

(c) Before any plan for desegregation is put into effect, further studies should be made of the subject, and plans further developed that the children of both races will not be handicapped by a radical change in their classroom life.

During the week of August 27, 1956, serious trouble developed in Anderson County, Tennessee in the integration of the Clinton High School. This trouble produced several tense hearings and trials in this Court. In September, 1957, a Nashville, Tennessee elementary school was bombed and severely damaged. On October 5, 1958, Clinton High School in Clinton, Tennessee was bombed causing damage estimated at $250,000.00 to $300,000.00.

A hearing was held by this Court on February 8, 1960 on plaintiffs' motion for a preliminary injunction prohibiting the defendants from refusing to admit or transfer the infant plaintiffs to the schools to which they had applied for admittance on account of their race or color and for the declaratory relief sought in the complaint. At this hearing, defendant, Board of Education, agreed that it would submit a plan for desegregation on or before April 8, 1960. Action on other phases of the relief sought in the complaint was postponed, pending the submission of the plan.

On April 8, 1960, the Board filed the following Plan, which is sometimes referred to as Plan Nine:

"1. Effective with the beginning of the 1960-61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.

2. Effective for 1961-62 school year racial segregation shall be discontinued in Grade Two and thereafter

in the next higher Grade at the beginning of each successive school year until the Desegregation Plan is effected in all twelve grades.

3. Each student entering a desegregated grade in the Knoxville Public Schools will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.

4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.

5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

6. The following will be regarded as some of the valid conditions to support requests for transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only;

   b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

One Board Member voted against the Plan, stating that "what the Board is doing is a mistake."

The Members of the Board are continuously changing, while the Members of the Administrative Staff remain constant. Certain Members of the Board are elected at biennial election and this puts the terms of the Members on a staggered basis.

Plaintiffs filed seven objections to the Plan on April 18, 1960. It is insisted by the plaintiffs in these objections that: (a) The Plan does not provide for elimination of racial segregation "with all deliberate speed" as required by the Fourteenth Amendment to the Constitution; (b) it does not take into account the five years which have elapsed during which the Board has failed and refused to comply with the Fourteenth Amendment; (c) a period of twelve years for the consummation of the Plan is not in the public interest and is not in compliance with the Fourteenth Amendment; (d) the defendants have not carried the burden of proof of showing problems related to public school administration as specified by the Supreme Court in the second decision of *Brown* v. *Board of Education* (May 31, 1955), 349 U. S. 294; (e) under the Plan, the infant plaintiffs and all other children attending the public schools of Knoxville in their class will be deprived of their right to attend a desegregated school as guaranteed to them by the Fourteenth Amendment; (f) the Plan deprives infant plaintiffs and those similarly situated from enrolling in Fulton Technical High School and other special vocational schools, summer

courses and kindred educational training of a specialized nature as to which enrollment is not based upon residence; and (g) Paragraph 6 of the Plan violates the due process clause of the Fourteenth Amendment in that said paragraph provides racial factors as conditions to support requests to transfer, and the racial factors are designed and necessarily operate to perpetuate racial segregation.

A trial was held on August 8-11, 1960 on defendants' motion for the adoption of the Plan and plaintiffs' objections thereto. Substantial testimony was introduced during the trial, a material portion of which consisted of the reading of discovery depositions of various individual defendants and of a number of adult plaintiffs.

The controlling issue in the case and to which the greater part of the evidence was directed is:

Is the time delay provided for in the grade a year desegregation proposal reasonably necessary in the public interest and is it "consistent with good faith compliance at the earliest practicable date"? See *Brown* v. *Board of Education, supra.*

It is the position of the Board that a more accelerated plan for desegregation would cause administrative problems of great magnitude and serious interruption in the operation of the Knoxville School System with resultant deleterious effects upon the school children of both races.

The Board maintains that the grade a year plan is a compliance with the "deliberate speed" concept in the light of the existing conditions in the Knoxville area.

As to the good faith phase of the issue, the Board insists that its Members, the then Superintendent of Schools and the Members of his Staff, began to consider the question of desegregation immediately following the first decision in the *Brown* Case in 1954 but that they withheld efforts to

perfect a plan until the second *Brown* decision on May 31, 1955; that following this decision Board meetings and workshop meetings were held by the Board with principals of negro schools and white schools; and that much of the literature on the subject of desegregation was studied with the view of finding a plan that would meet the needs of the Knoxville community and at the same time protect and enforce the constitutional rights of the negro children attending the public schools of Knoxville.

In support of the Plan, *Superintendent Johnston* testified that he became Superintendent on June 15, 1955 and that on the next day he asked his Administrative Staff to come together to discuss the Supreme Court's decision and steps that ought to be taken to study the best approach to compliance with the decision; that out of the meeting grew the suggestion that some Members of the Staff and of the Board visit a city with experience in desegregation; and that the City of Evansville, Indiana was chosen because of its comparable size and because it had been operating under a desegregated program since 1949. He testified that two Members of the Board and two Members of the Staff visited the schools in that City and spent a day or more in the schools and with the superintendent.

Subsequently, on July 25, 1955, he inaugurated a program of inviting white principals, Members of the Board and Staff to discuss how best to comply with the Supreme Court's decision. He attempted at the meeting to establish an atmosphere or environment under which these persons would talk freely on the subject.

A week later, they had a similar meeting with the negro principals, Members of the Board and Staff at which exactly the same matters were discussed in an atmosphere under which the negro principals would feel free to ask questions and make suggestions.

He testified that separate meetings were held at his own suggestion with the thought that participants would talk more freely if they met separately and that thereby he could better assess whether there was opposition or a good feeling about the whole business.

At the same time, he inaugurated a series of Staff meetings for a period of an hour a day for 15 successive working days for the exchange of views on the problem.

On January 26, 1956, he testified that they convened a meeting of the negro principals and general supervisors in the central office to determine whether they were willing to participate in a series of meetings to consider the subject of desegregation. A similar meeting with the white principals came a few days afterwards.

On February 1, 1956, a Staff meeting was held to survey the willingness of principals of both groups to join in a study group or workshop. On February 2, 1956, all principals regardless of race were called for a meeting in the central office at which no shyness or reticence to discuss the subject appeared. He commented that for 32 years to his personal knowledge negro principals and white principals had met together in regular meetings.

He testified that a series of workshop meetings were developed to explore different plans and that out of these meetings there evolved eight suggestions to be submitted to the Board of Education without recommendation which were the result of the studies of the principals of both races and of the Staff.

Subsequently, in January, 1957 at a meeting, he requested the principals of both races and the supervisors to meet with him to further discuss the subject. At that meeting he indicated that he would like personally to come to the schools and sit down with their faculties and talk with the

teachers to see how they felt on the subject because he felt that "the burden of making that plan successful . . . would be on the shoulders of the teachers who work closely with children and with parents." Following this meeting, he testified that he started going to schools at the invitation of the principals and that he attended 12 to 15 such faculty meetings. It was his purpose to discover through these informal meetings whether there were members of the faculties who opposed any form of desegregation. He wanted to determine whether there were pockets of resistance or whether a favorable climate for compliance existed among the teachers. These meetings continued through the school year 1957. By Fall, he testified, the invitations seemed to slow down and that he seemed to detect a feeling amongst the negro and white principals which did not exist before. He pointed out that there had been dynamiting and other difficulties around the Knoxville area; and that trouble had arisen in Nashville and Clinton.

Superintendent Johnston stated that violence occasioned by desegregation in neighboring cities caused us to reflect a little more on how it will affect us and made us more conscious of what might happen here. He pointed out that no child could get an education operating under a feeling of fear or tension or emotional unrest and that every day a child loses from its normal educational program is practically gone forever and will never be completely regained; that order is the first law in the classroom and that an educational program must have order if children were going to learn. He said: "We were concerned with that."

At the same time, he noted that the School Board was engaged in an extensive building program which involved both Staff and Board and which was heavily time consuming; that Board and Staff Members examined blue-

prints and drawings of the architects minutely and that they made innumerable visits to the buildings when they were under construction and that before a building was accepted it was the duty of the Board to go through it, inspect the rooms, corridors and facilities in the company of the architect and of the representative of the contractor.

This was a massive building program carried out under Bond Referendums of 1946 and 1954 and involved nearly eight million dollars of new construction and remodeling in both white and colored schools.

In implementation of the Plan filed on April 8, 1960, the Superintendent testified that he instructed his Staff to begin work on a zoning map which was approved at a meeting of the Board on August 6, 1960, just two days before the hearings began. He testified that he instructed his Staff that in the preparation of the map there would be no maneuvering or gerrymandering, that the re-zoning and re-establishing of school zones must be based on enrollment studies and on the size and capacity of the buildings. The work was in charge of Mr. Frank Marable, Supervisor of Child Personnel, whose duty it is to check on attendance, school zones and the movement of people.

On cross-examination, he testified that in preparing the map, efforts were made through the pre-school round-up program and estimates of principals to get estimates of the number of children that would be affected. This zoning plan was confined to the elementary schools and did not include the secondary schools.

Under detailed cross-examination, Mr. Johnston pointed out that small groups or pockets of negro homes were scattered throughout the Knoxville City School System in contrast to major concentrations of negro citizens; that the zone boundaries were often dictated by artificial barriers

like heavily traveled streets and also by the size and capacities of school buildings.

In response to a question that some capacity was preserved at Park Lowry for transfers which were authorized under the Plan, he testified that he had no way of knowing who was going to ask for a transfer and that he only knew that under the Plan white students and negro students would be treated alike.

He testified categorically that no member of his Staff in working on the map had ever operated deliberately to cut out negro children; and that they tried to work the thing out on a fair basis, depending on the size of the building, shifting population and enrollment.

With reference to the fact that eight plans were originally developed for submission to the Board and that the Plan which was finally adopted involved only a grade a year desegregation, he testified that the Plan adopted was based on the experience around us and studies of the general situation of desegregation; that it was felt that this plan could be introduced in the City of Knoxville with the least disturbance to the over-all educational program; and that it would be accepted by the majority of citizens with less tension and less emotional excitement than any other plans that had been studied.

He reiterated that the Knoxville School System had been in existence since 1870 and that desegregation would not be easy; that it was the goal to achieve desegregation and at the same time maintain an orderly decorum or environment under which all children could continue to go to school day by day free from tension and free from fear. He repeated that order is the first rule of a classroom.

In presenting the grade a year plan to the Board, the Staff made seven observations in favor of the plan. The

first was that it appeared to meet the requirements of the Supreme Court decision and of the laws of the State which placed the burden or responsibility on local boards for desegregation and for the assignment and placement of students. Second, the Plan did not limit the speed with which it could be implemented. Third, it provided for gradual implementation until the complex problems of zoning, transfer and assignments of students could be adjusted in the light of experience. Fourth, it had the advantage of numerous other plans as a background for its adoption. Fifth, the main features of the Plan have been upheld by higher courts. Sixth, the Plan lessened the opportunity for developing prejudices. Seventh, it minimized the possibility of administrative problems that could be of such complexity and magnitude as to seriously undermine and impair the total educational program of the City.

Finally, he emphasized the adaptability of small children and that they do not have the prejudices of older children or grown people and could be fitted into the work easier than older children. He felt that the gradual plan would enable the school system to continue a fine educational program with less tension, less fear and less emotional disturbances than a plan which rushed into a broader field of desegregation. He felt that the gradual plan would have the sympathetic understanding of the great majority of the citizens of the City. He pointed out the importance of this in going before the City Council on behalf of school budgets with which to operate the schools; that the School System had to have the sentiment of the people with it because it involves budgets, their attitude towards referendums for new schools and new buildings, etc.

With reference to evidence that there had already been desegregation of ball parks, public libraries, buses and air-

port restaurants, etc. in and around Knoxville and that this would seem to indicate that a speedier plan of desegregation could be inaugurated. Superintendent Johnston pointed out that under the compulsory attendance law, children are compelled to go to school for a period of seven hours a day and that he knew of no law that compelled them or any adult to go to a ball park, the library or airport restaurants. He pointed out that those were optional matters, but that under the school law children were required to go to school.

In the course of his testimony, Superintendent Johnston testified to certain achievement tests given all children in the sixth grade in the Knoxville schools. His testimony was that as a result of these tests it appeared that the achievement levels of students from white schools were somewhat above the national norm and that the student level from colored schools were substantially below the national norm. This testimony was objected to by the plaintiffs on the ground that the results of the tests were hearsay. The Court recognized this objection, but admitted the testimony for such bearing as it might have on the good faith of the Board in utilizing the grade a year plan.

In his deposition, Superintendent Johnston was asked about the industrial courses given at Austin High School, the colored school, and at Fulton High School, the white technical school. It appeared from his testimony that Fulton High gives a course in television, a course in advanced electronics, ones in air conditioning, refrigeration, commercial art, commercial photography, distributive education, drafting, machine shop, printing and sheet metal which are not offered at Austin High School. Certain courses, he testified, such as brick masonry, tailoring, etc., are offered at Austin which are not offered at Fulton.

Colored students are not admitted to these courses at the present time at Fulton High School because of the segregated schools.

Generally, the testimony of Superintendent Johnston was that the school facilities and teaching level at both the colored and white schools are equal. He pointed out that the colored teachers are paid at the same salary level as those in the white schools and that the work done is equivalent. These facts were also stipulated.

The conclusion the Court draws from this evidence is that students including plaintiffs now in school who would not, if Plan Nine were adopted, be permitted to go to an integrated school, would still have equal opportunities for an education in the fine colored schools with their excellent teaching staffs.

This conclusion is not true of the special technical courses offered at the Fulton High School. Under Plan Nine colored students now in school and desiring those courses would be barred from taking those courses. They would have to complete their scholastic education without the opportunity of taking these courses. Superintendent Johnston testified that he had talked to the teachers in the Fulton High School and they were of the opinion that to admit colored students to these courses would cause trouble and disciplinary problems, an opinion in which he joined.

Nevertheless, the Court feels that despite the great merit of Plan Nine, it is deficient in that it precludes colored students now in school from ever participating in these specialized courses.

Mr. Burkhart, Chairman of the Board since 1958, was of the opinion that complete desegregation would disrupt the orderly process of education in Knoxville and that the children of both races would be materially affected thereby.

This opinion was based in part on the attitude of the great majority of the citizens of the Knoxville area who feel that the citizenship is not prepared at this time to accept anything except gradual desegregation. He was further of the opinion that complete desegregation would cause violence in the community.

This Court recognizes that the Supreme Court stated in substance in *Cooper v. Aaron*, 358 U. S. 1, that opposition to desegregation was not alone a sufficient reason to postpone desegregation. But, the Court also stated in substance in *Brown v. Board of Education*, 347 U. S. 483 that one of the factors that the trial court should consider in resolving the question of immediate and complete desegregation or gradual and complete desegregation is the interest of the people who are affected in the community.

Dr. Burkhart was of the opinion that gradual desegregation would be best for the students and for the community. He felt that an abrupt change would affect the teachers and the students of both races and would create serious administrative problems.

Dr. Moffett, another Member of the Board, felt that Plan Nine was the best plan for the Knoxville schools and gave three principal reasons to support his belief, which are in substance as follows:

(a) First grade eliminates any educational advantages or disadvantages.

(b) The present Plan is more receptive to constituents.

(c) The present Plan is better for teachers and other personnel of the schools.

Andrew Johnson, a well-known lawyer of Knoxville, served as a Member of the Board from January 1, 1954

through December 31, 1957. He explained in detail the careful study made by Members of the Board and school personnel during the period that he was a Board Member.

A building program involving some eight million dollars was inaugurated and extensively carried on while he served as a Member of the Board. This program consumed considerable time of Board Members.

A series of meetings were held by Board Members with the Superintendent and his Staff during the year 1955 when desegregation matters were discussed. The initial attitude of the Board was to comply with the law with respect to desegregation as declared by the Supreme Court in the *Brown* Case. In 1954, the Members of the Board felt that desegregation could be effectuated without too many problems because the citizenship at that time appeared to be passive. Later, the Board Members began to hear rumbling of the disturbances from citizens and when actual violence began in Clinton, it caused the Board to go slow. This violence gave rise to a consciousness of the Members of the Board of the dangers of making an unwise step. The Board was delayed by circumstances over which it had no control.

The opinion of the public influenced the actions of the Board. The Board was looking at local conditions. Threats of violence were made if desegregation were inaugurated. On June 10, 1957 some fifteen citizens appeared before the Court and some of them suggested that the Board Members resign rather than institute desegregation. There was real danger.

One John Kasper appeared before the Board that night. Mr. Johnson received a number of telephone threats. The Members of the Board were afraid of physical violence against the colored children. At that time, the colored principals of the schools felt that desegregation should be

given thorough consideration, but that it should not start immediately.

The dynamiting and other violence in Clinton and Nashville were other causes for the Board moving towards desegregation more slowly.

Mr. Marable, is Supervisor of Child Personnel. He handles transfers. He stated that the schools were overcrowded in some sections. Transfers were comparatively easy under the old plan although they are considered carefully. If the reasons are good, a transfer is made. It is an administrative matter. Primarily, a child is expected to go to school in the zone of his residence.

Plaintiffs, Mrs. Barber, and Messrs. Robinson, Sr., Ward, Graves, Winton, Sr. and Goss, testified to having made applications for admittance of their minor children to white schools, all as shown in the complaint and the stipulation, and that they were denied admittance solely because of their race or color. Each of these plaintiffs gave a reason why he wanted his infant child to attend a white school, one of the reasons being that he or she lived near the white school.

This Court is of the opinion and finds that the foregoing evidence shows beyond question good faith on the part of the Board in making an honest effort to find the solution of a very troublesome problem, namely, a plan of desegregation that would best fit the needs of the Knoxville area and at the same time implement the decision of the Supreme Court in the *Brown* Case. The teaching of that case, as well as that of the cases of *Cooper* v. *Aaron*, *supra* and *Kelley* v. *Board of Education* (C. A. 6), 270 F. 2d 209, is that the problem of desegregation must be solved in accordance with the exigencies of the case and that the interest of the school children of both races, the interest of the school personnel and of the community involved are

the prime factors in resolving the issue; that local school problems differ and what would be a reasonable time to integrate in one community might be unreasonable in another community; that the question of speed is to be decided with respect to existing local conditions; that the operation of the public schools is the business of the local School Board and that the courts should not interfere with such operation unless it is necessary for the enforcement of constitutional rights; and that the Court should not substitute its judgment for that of the local School Board in the promulgation of plans of desegregation and that if the Board has acted in good faith its action should not be set aside so long as such action is consistent with the eventual establishment of a non-discriminatory school system at the earliest possible date consistent with the interest of the school children, school personnel and the community.

The Court finds that the Plan submitted by the Board is not only supported by the preponderance of the evidence, but by all of the evidence, with one exception. With reference to the technical courses offered in the Fulton High School to which colored students have no access, it directs that the defendants in this cause restudy the problem there presented and present a plan within a reasonable time which will give the colored students who desire these technical courses an opportunity to take them.

This Court is concerned—gravely concerned—with the incidents of unrest and violence which have attended the desegregation of schools in nearby communities. They have not only been made matters of evidence in this case, but some are matters with which this Court has had to deal, and of which it takes judicial notice. These incidents have been characterized by the bombing of homes and of school buildings and by acts of individual terrorism which have de-

stroyed the orderly atmosphere in which good schooling can thrive. They have revealed pockets of hate and lawlessness which are overshadowing imponderables in this case.

Glowing pictures of what may be, or ought to be, characterize the partisanship of those not called upon to make decisions. It is easy to ignore, and many of these partisans have ignored, considerations which weigh so heavily upon the Court. Some who might have taken responsibility have, despite the admonitions of the Supreme Court in the *Brown* and other cases, chosen not to assume it.

As the case has developed, the ultimate responsibility for decision rests with the Court. It alone must deal with the realities—realities with which it has had acrid experience.

If it decides wrongly, the transition towards the goal of a harmonious and unified school system—a goal to which all parties to this case subscribe—will receive an untold setback. If it decides rightly, there may well be smooth and steady progress toward full integration. Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there.

Perhaps the transition could be faster. Who can know? When a bridge is built or modified, engineers add a factor of safety far beyond the expected load. The analogy breaks down. In altering a school system, no one knows the load; there is no known factor of safety. Traditions, ways of thinking, aspirations, human emotions—all are involved. Emotions are sometimes stable, sometimes explosive. This Court has had experience with both. It rather anticipates

that the emotions of the people of Knoxville are under control. It does not know. It would have had the same expectation of another community. It was wrong.

All things considered, Plan Nine seems to offer more safety and more assurance for an orderly progression toward a fully unified school system. Under the evidence, there is less danger of disorder—more hope of steady progress. When the risks of which this Court is cognizant are taken into account, Plan Nine seems to meet the tests laid down by the Supreme Court. The Plan, with the reservation noted, is approved.

Present order in accordance with views herein stated.

ROBT. L. TAYLOR
United States District Judge

Judgment of District Court

Filed: August 26, 1960

This cause came on to be heard on August 8, 9, 10 and 11, 1960, upon the entire record, upon stipulations, oral testimony, depositions and exhibits, without the intervention of a jury, and upon briefs and argument of counsel, pursuant to which the Court on August 19, 1960, filed its Memorandum, all of which are herein incorporated by reference.

It is, therefore, ORDERED, ADJUDGED AND DECREED, as follows:

1. That the Plan of The Board of Education of the City of Knoxville, approved by said Board on April 4, 1960, and presented to this Court on April 8, 1960, be approved with the single exception that the defendants in this cause are hereby directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time which will give the colored students who desire these technical and vocational courses an opportunity to take them. The defendant Board of Education of the City of Knoxville, Tennessee is hereby ordered to put said Plan as approved by this Court into effect in accordance with the tenor thereof.

2. That the prayer of the plaintiffs for injunctive relief and their motion for preliminary injunction be, and the same hereby are, denied.

3. That the jurisdiction of the action is retained during the period of transition.

To the foregoing actions of the Court, as contained in Paragraphs numbers 1. and 2. hereinabove, the plaintiffs except.

ROBT. L. TAYLOR
United States District Judge

Opinion of Sixth Circuit

No. 14425

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Josephine Goss and Thomas A. Goss, Infants by Ralph Goss, Their Father and Next Friend, et al.,

Appellants,

—v.—

The Board of Education of the City of Knoxville, Tennessee, a Body Corporate or Continuous Legal Entity, c/o Dr. John H. Burkhart, President, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION.

Decided April 3, 1962.

Before: Cecil, Weick and O'Sullivan, Circuit Judges.

Cecil, Circuit Judge. This cause is before the Court on appeal from an order of the United States District Court for the Eastern District of Tennessee, Northern Division, concerning the desegregation of the school system of the city of Knoxville, Tennessee.

The appellants were plaintiffs in the District Court and are all Negro citizens of the United States and state of Tennessee, and residents of the city of Knoxville. The

are children who were attending the public schools of Knoxville, at the time this action was begun, and their parents or guardians. The action was brought by the named plaintiffs for themselves, individually, and on behalf of all persons resident of Knoxville, similarly situated.

The appellees were defendants in the District Court and are members of the school board of the city of Knoxville, together with the superintendent of schools and other administrative officers of the Knoxville school system. They are sued in their official capacities and as individuals.

The parties will be referred to hereinafter, respectively, as plaintiffs and defendants.

The complaint was filed on December 11, 1959, and invoked jurisdiction by virtue of sections 1331, 1343, 2201 and 2202, Title 28 U. S. C. and sections 1981 and 1983, Title 42 U. S. C. By their complaint, the plaintiffs seek orders restraining the defendants from refusing to admit the named plaintiffs to certain schools operated by them as so-called "white" schools, on account of plaintiffs' race or color; for an order declaring the custom, policy, practice or usage of excluding plaintiffs and other persons similarly situated from any schools of the city of Knoxville solely because of race, pursuant to certain constitutional and statutory provisions of the state of Tennessee, to be unconstitutional and void; for a permanent injunction restraining the defendants from operating their schools on a biracial basis, and in addition thereto for an order requiring the defendants to present to the Court a plan "designed to bring about good faith compliance with the decision of the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U. S. 483, at the earliest practicable date throughout the Public School System of the City of Knoxville."

The defendants in their answer admit that the schools of Knoxville, at the time this action was begun, were operated on the basis of separate schools for white children and separate schools for Negro children. They say this was in accordance with constitutional and statutory provisions of the state of Tennessee (Art. 11, Sec. 12. Tenn. Const., Secs. 49-1005, 49-1107, and 49-3701, Tenn. Code); that they did not feel that they could change this system without the compulsion of law; that the schools for Negroes were excellent and that there was no discrimination against them in the type of education they received; that while there were white teachers for white children and Negro teachers for Negro children, they were paid on the same basis; that since the *Brown* decision, they have studied plans of integration, but that up until this time delay has been well advised. They say they "owe no apologies to anyone, and make none."

After the complaint was filed, the trial judge gave the defendants until April 8, 1960, to submit a plan of integration. A plan was submitted in accordance with this order and the principal question now before this Court is whether that plan is adequate to comply with the decisions of the Supreme Court.

The plan called "Plan No. 9" provides for school zoning based upon location and capacity of school buildings and admission to schools by reason of residence in a zone without reference to race; discontinuance of racial segregation in steps of one grade a year, beginning with the first grade, effective with the school year, beginning 1960-61, and a system of transfers in which the following will be recognized as some of the valid conditions for transfer: "a. When a white student would otherwise be required to attend a school previously serving colored students only;

b. When a colored student would otherwise be required to attend a school previously serving white students only; c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

The plaintiffs objected to the plan for the reasons that, considering the five years that had already elapsed since the *Brown* decision, twelve years was too long a period to accomplish complete desegregation; that the board had not shown that the delay was necessitated by any administrative problems enumerated by the Court in the *Brown* decision; that it deprived Negro students already enrolled in school of an unsegregated education; that it deprived Negro students of an opportunity for education in certain vocational schools and summer courses; and that the transfer plan would operate to perpetuate segregation of the races in the public school system.

The case was tried to the court and a judgment entered on August 26, 1960. By this judgment, the court denied injunctive relief to the plaintiffs and approved the plan as submitted, except "that the defendants in this cause are hereby directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time which will give the colored students who desire these technical and vocational courses an opportunity to take them." It was further ordered that the board should put the plan as approved into effect.

On May 17, 1954, the Supreme Court decided, in *Brown v. Board of Education*, 347 U. S. 483, 495 (known as the first *Brown* case), "that in the field of public education the doctrine of 'separate but equal' has no place. Separate

educational facilities are inherently unequal." The Court held that segregation of Negro and white children for school purposes on a racial basis deprived Negro children of equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Thereafter, the maintenance of "Negro" schools and "white" schools was a violation of the United States Constitution.

The Court, according to the second *Brown* decision, 349 U. S. 294, realized that the transition required by its first opinion, from a custom and practice of so long standing, could not be easily accomplished and that administrative problems would be encountered which would prevent immediate abandonment of the biracial systems then in effect.

The court said, at p. 299: "Full implementation of these constitutional principles may require solution of varied local school problems." And at p. 300: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles." . . . "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling." And finally, the classic admonition that the district courts should make such orders as were necessary to admit all students "to public schools on a racially nondiscriminatory basis with all deliberate speed."

It was thereby recognized that some planning would have to be done to adapt a particular local system to the new method of operation and that in the process the rights of some individuals would have to be subordinated to the common good of posterity. In *Boson* v. *Rippy*, 285 F. 2d 48, the Fifth Circuit reversed the District Court when it

ordered immediate en masse desegregation, and instructed it to require the board to submit a plan.

We appreciate that in such a transition, as is here involved, emotions are deeply stirred and sensitive feelings touched. But these must give way to the mandates of the Supreme Court. As that Court said in *Cooper* v. *Aaron*, 358 U. S. 1, 16, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

It has been nearly eight years since the first *Brown* decision and under the plan before us the first and second grades are now integrated. The evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision. That the operation of schools on a racially segregated basis is a violation of the Fourteenth Amendment and that the constitutional and statutory requirements of the state of Tennessee prohibiting the mixture of races in schools cannot be enforced are no longer debatable or litigable questions. This has been obvious and evident since May, 1954.

The position of the board that it would continue to operate under these unenforcible laws, until compelled by law to do otherwise, does not commend itself to the Court, for the acceptance of a plan that provides for a minimum degree of desegregation. In the second *Brown* case, the Court said, at p. 300: "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." In our judgment, the defendants have not sustained this burden. We do not think that the twelve-year plan of desegregation adopted at this late date meets either the spirit or specific requirements of the decisions of the Supreme Court.

The transfer feature of the plan comes under sharp criticism of the plaintiffs. They claim that the operation of a such a plan will perpetuate segregation. We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. It is in the same category as the pupil assignment laws. They are not inherently unconstitutional. *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, D. C. N. D. Ala., affirmed, 358 U. S. 101. They may serve as an aid to proper school administration. A similar transfer plan was approved by this Court in *Kelly* v. *Board of Education of City of Nashville*, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924. We adhere to our former ruling with the admonition to the board that it cannot use this as a means to perpetuate segregation. In *Boson* v. *Rippy*, *supra*, the court said, at p. 46, the transfer feature "should be stricken because its provisions recognize race as an absolute ground for the transfer of students, and its application *might* tend to perpetuate racial discrimination." (Emphasis added.) This transfer provision functions only on request and rests with the students or their parents and not with the board. The trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands.

Some of the named plaintiffs seek orders restraining the defendants from refusing them admission to certain white schools. The district judge denied the requests for such orders. The questions presented by this phase of the case are moot as to some of the plaintiffs for the reason that they have now graduated from high school. When the defendants have complied with the mandate of this

Court to submit an accelerated plan, looking to the reorganization of the Knoxville schools on a racially nondiscriminatory basis, the questions of individual admission to so-called "white" schools may be moot as to some of the other plaintiffs now in elementary schools.

Judge Taylor wisely withheld aproval of the plan insofar as it denied Negro students the right to take the technical and vocational courses offered at Fulton High School. The board should, as he suggested, present within a reasonable time a plan that would permit all Negro students who desire and are qualified to have an opportunity to take the special courses of this high school.

As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan.

We think Judge Taylor was correct in denying injunctive relief and as he so eloquently said: "Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there."

In conclusion, we affirm the judgment of the District Court in the following respects; the approval of the plan insofar as it pertains to school grades already integrated; the approval of the plan as to items three and four thereof, providing for zoning or districting based upon location

and capacity of school buildings and the permission of students to attend schools designated for their zones; the approval of the plan as to transfers subject to it being used for proper school administration purposes and not for perpetuation of segregation; the rejection of the plan so far as it pertains to Fulton High School and the order to the board to resubmit a plan in a reasonable time that will permit Negro students to have the advantage of the special courses of that high school and the denial of injunctive relief.

We modify the judgment of the District Court insofar as it approved the board's plan for continued segregation of all grades not reached by its grade-a-year plan. It is not the function of this Court to formulate or dictate to the board a plan for the operation of the Knoxville schools. It is, likewise, not our intention to require immediate total desegregation. We do believe, however, that more grades than contemplated by the board's plan should now be desegregated. In the light of the board's experience with the present plan, it should be enabled to submit an amended plan that wil accelerate desegregation and more nearly comply with the mandate of the Supreme Court for "good faith compliance at the earliest practicable date."

The case is remanded to the District Court with instructions to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation, in accordance with the views herein expressed.

Judgment of Sixth Circuit

April 3, 1962

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part, modified in part, and the cause is remanded for further proceedings consistent with the opinion filed herein.

Approved for entry:

/s/ LESTER L. CECIL
United States Circuit Judge

APPENDIX B

Opinions and Judgments in *Maxwell* Case

District Court Findings of Fact, Conclusions of Law and Judgment

Filed: November 23, 1960

This cause came on to be heard before the Honorable William E. Miller, District Judge, on October 27, 1960, and prior days of the term, upon the entire record, oral testimony and exhibits without the intervention of a jury, brief and arguments of counsel, from all of which the Court finds and holds as follows:

Findings of Fact

1. The plaintiffs, all of whom are Negro school children and their parents and are citizens and residents of Davidson County, Tennessee, filed this action on 19 September, 1960, seeking declaratory and injunctive relief against enforcement of the custom, practice and policy of the defendant, County Board of Education of Davidson County and its Superintendent of Schools, J. E. Moss, requiring racial segregation in the County Schools and refusing to admit certain of the plaintiffs to certain schools solely because of their race or color. Plaintiffs also prayed for an order requiring defendants to submit a plan for reorganization of the entire County School System into a unitary nonracial school system, including plans for elimination of racial segregation in teacher and other personnel assignments, school construction, and the elimination of any other discrimination in the operation of the school system or in the school curriculum which are based solely upon race or color.

2. The defendants, Frank White; S. L. Wright, Jr.; F. K. Hardison, Jr.; Ferriss C. Bailey; E. D. Chappell; Aubrey Maxwell; and Olin White, together comprise all the duly elected members of the defendant County Board of Education of Davidson County, Tennessee, and are sued

in their individual and official capacities together with said Board of Education, which is sued as a continuous body or entity. Defendant, J. E. Moss, is the duly elected or appointed County School Superintendent and/or Superintendent of Public Instruction of Davidson County, and is sued in both his individual and official capacity. The Board of Education is vested with the administration, management, government, supervision, control and conduct of the public schools of said County, and defendant, J. E. Moss, as administrative agent for the Board, has immediate control of the operation of the County Schools, and serves as a member of the Executive Committee of the Board.

3. The defendants, acting under color of the laws of the State of Tennessee and County of Davidson, have pursued for many years and are presently pursuing a policy, custom, practice and usage of operating a compulsory racially segregated school system in and for said County. The racially segregated school system operated by defendants consists of a system of elementary, junior high, and high schools, limited to attendance by white children and negro children, respectively, of the County of Davidson. Attendance at the various schools is determined solely upon race and color. A dual set of school zone lines is also maintained. These lines are based solely upon race and color. One set of lines relates to the attendance areas for the Negro schools and one set to the attendance areas for the white schools. These lines overlap where Negro and white school children reside in the same residential area.

4. At the beginning of the September 1960, school term, the infant plaintiffs, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, made application individually and/or

through their parents to defendants for admission or transfer to Glencliff Junior High School and/or Antioch High School, same being "white" schools which are nearer to their residence than Haynes High School, the "Negro" school they are required to attend, and were refused said admission or transfer solely on account of their race or color. At the same time, the infant plaintiffs, Cleophus Driver, Christopher C. Driver, Deborah Driver, and Deborah Ruth Clark, made application individually and/or through their parents for admission or transfer to Bordeaux Elementary School, a "white" school which is nearer to their residence than Haynes School, the "Negro" school they are required to attend, and were refused admission or transfer by defendants, solely on account of their race or color. Had these infant plaintiffs been white children, they would have been admitted or transferred to the said "white" schools to which they applied.

5. The infant plaintiffs, Jacqueline Davis, Shirley Davis, George Davis, Jr., Robert Davis, Rita Davis, and Robert Rickey Taylor, reside nearer to a Negro school which they have been attending, but some of them accompanied the other plaintiffs when they made application for admission to said "white" schools, and all of them join in this action because they allege that they are being denied their right to enjoy a nondiscriminatory public education by reason of the compulsory racially segregated public school system which defendants are maintaining and operating in and for Davidson County.

6. At a preliminary hearing on 26 September, 1960, this Court reserved judgment on motions by defendants to strike and/or dismiss those portions of the complaint com-

plaining of segregated teacher and personnel assignments but ordered the defendants to submit a complete and substantial plan which will accomplish complete desegregation of the public school system of Davidson County, Tennessee in compliance with the requirement of the Fourteenth Amendment to the Constitution of the United States.

7. Pursuant to said order of the Court, the defendants subsequently filed with the Court the following plan for desegregation of the school system:

PLAN

1. Compulsory segregation based on race is abolished in Grade One of the Davidson County Schools for the scholastic year beginning in September 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Two in September 1962, Grade Three in September 1963, Grade Four in September 1964, etc.

2. A plan of school zoning based upon location of school buildings, transportation facilities and the most recent scholastic census, without reference to race, will be established for the administration of the first grade, and other grades as they are desegregated according to the gradual plan.

3. Students entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may become necessary in particular cases.

4. Application for transfer of first grade students, and subsequent grades according to the gradual plan,

from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration.

5. The following will be regarded as some of the valid conditions for requesting transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only.

   b. When a colored student would otherwise be required to attend a school previously serving white students only.

   c. When a student would otherwise be required to attend a school where the majority of students in that school, of in his or her grade, are of a different race.

6. A plan of pupil registration to be held each Spring to aid in formulating necessary arrangements for the opening of schools in the Fall, such as available room, teaching aids, textbooks, pupil immunizations, zoning, and transportation facilities, will be continued.*

7. Transportation will be provided to all students that are eligible for bus service.*

8. Thereafter, the plaintiffs filed the following specifications of objections to said plan:

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* This has been done for years.

District Court Findings of Fact, Conclusions of Law and Judgment, November 23, 1960

SPECIFICATION OF OBJECTION TO PLAN FILED BY COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY

The plaintiffs, Henry C. Maxwell, Jr., *et al.*, respectfully object to the plan filed in the above entitled cause on or about the 19th day of October, 1960, by the defendant, County Board of Education of Davidson County, Tennessee, and specify as grounds of objection the following:

1. That the plan does not provide for elimination of racial segregation in the public schools of Davidson County "with all deliberate speed" as required by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. That the plan does not take into account the period of over six (6) years which have elapsed during which the defendant, County Board of Education of Davidson County, has completely failed, neglected and refused to comply with the said requirements of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. That the additional twelve (12) year period provided in said plan is not shown to be "necessary in the public interest" and "consistent with good faith *compliance* at the earliest practicable date" in accordance with the said requirement of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. That the defendants have not carried their burden of showing any substantial problems related to public school administration arising from:

a. "the physical condition of the school plant";

b. "the school transportation system";

c. "personnel";

d. "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis";

e. "revision of local laws and regulations which may be necessary in solving the foregoing problems";

as specified by the Supreme Court in *Brown* v. *Board of Education* (May 31, 1955) 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 653, which necessitate the additional time contemplated by their plan for compliance with the constitutional requirement of a racially unsegregated public educational system.

5. That the plan is manifestly a substantially exact copy of the "Nashville Plan" adopted by defendants without reference to the local conditions in Davidson County as a minimum plan predicated on subjective and mental fears of the defendants as to possible community hostility or friction among students, and is not supported by a showing of any objective administrative conditions or problems which legally justify its complete deprivation of the constitutional rights of plaintiffs and all other children now in school to an integrated education by projecting the bar of segregation into the next twelve years.

6. That the plan forever deprives the infant plaintiffs and all other Negro children now enrolled in the public schools of Davidson County, of their rights to a racially unsegregated public education, and for this reason violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

7. That the plan wholly ignores and fails to comply with the statement of this Court from the Bench on 26 September, 1960, holding that the individual plaintiffs "have been denied their constitutional and legal rights", and suggesting that they be accorded these rights by defendants voluntarily rather than by court order, in that under the plan the individual plaintiffs can never be admitted to an integrated school and are forever deprived of their rights to a racially integrated public education in Davidson County.

8. That the plan fails to take into account recent annexation by the City of Nashville of a large area of surrounding Davidson County resulting in the public schools of said County becoming a part of the City of Nashville School System, which latter School System is now desegregated from the first through the fourth grades.

9. That the plan fails to take into account the rights of the infant plaintiffs and other Negro children similarly situated and forever deprives them of their rights to enroll in and attend any technical or other special or vocational schools, summer courses and educational training of a specialized nature as to which enrollment is not based on location of residence.

10. Paragraph five (5) of the plan violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that said paragraph provides racial factors as valid conditions to support requests for transfer, and further in that the racial factors therein provided are manifestly designed and necessarily operate to perpetuate racial segregation.

11. That the plan contemplates continued maintenance and operation by defendants of "Negro" and "white" schools substantially designated by race, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, in that it fails to make any provision for the reorganization of the entire County School System into a unitary, nonracial school system so as to include a plan for the assignment of teachers, principals and other school personnel, as well as school children, on a nonracial basis; for the allotment of funds, construction of schools and approval of budgets on a nonracial basis; and for the elimination of all other discriminations in the operation of the school system or in the school curriculum which are based solely on race and color.

WHEREOF, the plaintiffs pray:

1. That the Court grant their motions for temporary restraining order and preliminary injunction so as to require the immediate admission by defendants of the individual plaintiffs to the public schools of Davidson County, Tennessee on an unsegregated basis.

2. That the declaratory and permanent injunctive relief prayed for in their complaint be granted, said injunctive relief to be effective not later than the beginning of the Spring Semester or Term of the public schools of Davidson County in January 1961.

3. That the defendants be required by the Court to reorganize the entire County School System of Davidson County, Tennessee into a unitary nonracial school system, including all of the matters prayed for in the sixth prayer of the complaint filed in this cause.

9. At the hearing on said plan on 24 October 1960, the defendants offered, in support of the plan, the testimony of Mr. Ferriss C. Bailey, Chairman of the Special Committee of the Board charged with preparing the plan, who had been a member of the Board for several years and previously had been a member of the City of Nashville Board of Education, and who testified that the plan was prepared by the Staff, and that the Board accepted and approved the plan and that he thought it a wise plan. Mr. J. E. Moss, the County Superintendent for many years, testified as an expert that he believed the plan to be a wise and workable one; Mr. W. H. Oliver, Superintendent of Schools of the City of Nashville, testified as an expert that the Nashville grade a year "stair-step" plan initiated under Court order in 1957 had proved a wise and workable one for Nashville. In addition, the Attendance Officer, Psychologist and Transportation Officer of the County Schools, testified as to data relating to school population, pupil achievement levels and school bus transportation respectively, in the County School System. Defendants also introduced a zoning map and attendance schedule showing

the projected maximum expected distribution of Negro school children in presently white County Schools under nonracial zoning. All of said staff members had several years experience in their respective positions in Davidson County, and were intimately acquainted with conditions in that county and all problems involved in desegregation therein.

10. In opposition to the plan, plaintiffs introduced the testimony of Dr. Herman Long, Director of the Department of Race Relations, American Missionary Association of the Congregational Church, and teacher of Sociology in Fisk University, Nashville, Tennessee, for several years, an expert in the field of race relations in the United States; Dr. Eugene Weinstein, Assistant Professor of Sociology in Vanderbilt University, Nashville, Tennessee, an expert in the field of child development, who has conducted a recent research study of attitudes of Negro parents involved in public school desegregation in the City of Nashville, located within Davidson County, Tennessee; Dr. J. Masuouka, Professor of Sociology and Chairman of the Department of Social Science at Fisk University, Nashville, Tennessee for several years, an expert in the field of race relations among peoples of the world; and the plaintiffs, Henry C. Maxwell, Sr., Mrs. Annie P. Driver, and Mrs. Floy Clark (the latter by stipulation). The plaintiffs testified that they objected to the plan because it would prevent their children now in school from enjoying their constitutional rights to a nonracially discriminatory public education, that their children wanted to enjoy such an education now, and that they feel their children are being injured by the racially segregated education they are now

receiving. The plaintiffs' aforesaid expert witnesses were of the opinion that desegregation could reasonably be effected in the Davidson County School System within one year; and that the pupil transfer provision contained in the proposed plan, as drafted, would necessarily tend to perpetuate segregation. However, these witnesses, although expert witnesses and outstanding men in their respective fields, have had no actual experience with or responsibility for the administration of the schools in Davidson County and lack the same intimate knowledge of local conditions possessed by defendants' witnesses.

11. This Court approved in the case of the City of Nashville a plan of gradual desegregation after considering the particular facts which prevailed in that case. This plan of gradual desegregation, according to the testimony in this case, has worked well in the City of Nashville and has proved to be a workable and a feasible plan of desegregation. It has proved to be, in the opinion of the Superintendent of City Schools, a very wise plan for this community.

12. As stated, the school authorities of Davidson County, including the members of the staff, are close to the situation in Davidson County, are more intimately acquainted with them and have more knowledge about them than anyone else could possibly possess and the primary responsibility rests with these authorities, whose prerogatives and rights should not be usurped by the Courts.

13. From the testimony in this case it is evident that:

a. A plan of gradual desegregation works with a minimum of difficulties in this community.

b. Practically all of the schools of Davidson County are or may be affected by a plan of desegregation for the reason that the areas populated by Negroes are greatly scattered throughout the County.

c. There has been a tremendous increase in the school population in Davidson County over the past several years, with the result that practically all of the school housing facilities are crowded or overcrowded and the teacher-pupil load is at a peak in the system.

d. The County school system operates a transportation system, which system is presently operated at peak capacity, and the bus drivers are solely charged with maintaining discipline on the bus, in addition to their other duties, so that any factor which increases or tends to increase disciplinary problems on the buses likewise increases the hazards to the safety of the pupils. Discipline among the pupils on the buses is increased with a mixing of the races, especially when such is commenced at grade levels above the first and/or first and second grades.

e. Because the children of the two races have not been intimately associated due to proximity of residences in the County, a great emotional impact will be experienced by the children of both races following desegregation of the schools.

f. Negro children in the higher grade levels who have not previously attended desegregated schools have an achievement level substantially below that of white children, and such disproportion in achievement level

increases in direct proportion to the grade of the child so that any complete desegregation, except upon a graduated basis, would create additional difficulties for the children of both races.

g. Any change of organization or plan in the school system, other than at the end of a school year or a school semester, would cause confusion and disruption of classes with an accompanying loss of teacher time and student time.

14. The school in the Bordeaux community, one of the schools where the plaintiffs have made application for enrollment, has been partially destroyed by fire, and the school population there is presently being cared for on a make shift basis, with all existing facilities overtaxed. The Antioch School, one of the schools where plaintiffs made application for enrollment, is the most overcrowded school in the entire system, and the time consumed in traveling to the Antioch School by bus from the residence of these plaintiffs is as great as the time consumed by such plaintiffs in traveling by bus to the Haynes High School, to which they are presently assigned.

15. It is particularly desirable to have the school system of the City of Nashville and that of Davidson County operating on a parallel basis.

Conclusions of Law

1. This Court has jurisdiction of the parties and of this action, which is filed pursuant to Title 28, United States Code, Sections 1331, 1343, 2001 and 2202, and Title 42, United States Code, Section 1983, for injunctive and de-

claratory relief to redress rights of the plaintiffs secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and by the Act of May 13, 1870, Chapter 14, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981).

2. This is a class action brought not only by the plaintiffs for their own benefit but also on behalf of all other persons similarly situated.

3. The Court at the outset considers the case with the established principle that compulsory racial segregation is unconstitutional and that the plaintiffs and those they represent are entitled to have their rights declared and enforced accordingly.

4. In approving a plan of gradual desegregation in the case of the City of Nashville, after considering the particular facts which prevailed in that case, the Court made the statement in substance that each case must be determined on its own facts and that a decision elsewhere in the United States may or may not be relevant depending upon the conditions, whether or not they were comparable to the situation which prevailed here, and that, after all, this was a problem which must be determined locally and in accordance with local conditions. That case was appealed to the Court of Appeals of this Circuit, and was affirmed in a unanimous decision of that court. Thereafter at a later date the Supreme Court of the United States refused to review it by denying certiorari, which left, insofar as this Court is concerned, the decision of the Court of Appeals in full force and effect as stating correct legal principles.

District Court Findings of Fact, Conclusions of Law and Judgment, November 23, 1960

5. This Court does not hold that automatically the Nashville Plan constitutes the plan which should be applied to Davidson County. The pertinent factors must be weighed and assessed, and if the factors are substantially similar, then the precedent of that case should guide the Court in the decision of this case. If they are materially dissimilar, then that case would not apply. Considerable flexibility is involved in applying the controlling legal principle.

6. The Court must decide the case in accordance with what it thinks is a realistic plan for the community itself, considering all of the conditions and circumstances involved, the administrative problems, the personnel problems, and any other relevant and pertinent factors, one of the important ones of which is the efficient and harmonious operation of the school system itself. The Court must not disrupt and destroy the school system. That fact must be kept in mind always.

7. The Supreme Court has recognized the principle that the primary responsibility in assessing and weighing these factors rests with the constituted school board and authorities.

8. The Court does not have any doubt that the School Board has acted in good faith, and has fully carried the burden of proof to show the feasibility of the principal features of the proposed plan.

9. The plan presented by the defendant County Board of Education should be approved by the Court with the following exceptions and modifications:

a. Instead of the first grade being desegregated, as contemplated by said plan, the Court is of the opinion and holds that the first four grades should be desegregated at one time. This will equalize the plan with the City of Nashville Plan. It is particularly desirable to have the grades of the two systems operation on a parallel basis.

b. In view of the delay which has already occurred in regard to desegregation, the plan should be effective and should be put into operation (that is, the first four grades should be desegregated) at the beginning of the next school semester beginning January 1961, rather than the next school year; and the first five grades will be desegregated beginning September 1961.

c. A specific provision should be included in the decree for the complete elimination of any possible discrimination with respect to the summer classes which are attended by outstanding students. In other words, facilities on a nondiscriminatory, desegregated basis will be provided for students of this type, and provision will be made to notify all teachers in the system, both colored and white, of the availability of these classes, so that there will be no doubt about the colored students having knowledge of the opportunities made available in this respect.

d. Specific notice will be given to all parents of the zone in which their children live. In other words, before the beginning of the school year, the parents of all children will receive specific notice of the zone in which their children fall for the purpose of attending classes

in order that there may be removed any possible doubt about some people not having full information.

e. The Court will retain jurisdiction of this case throughout the period of transition.

10. The legal rights of all plaintiffs are recognized and declared but they are enforced in accordance with the provisions of the plan with the above modifications. Said plan is not a denial of the rights of the individual plaintiffs, but is a postponement in enforcement of the rights of some of the plaintiffs in the interest of the school system itself and the efficient, harmonious, and workable transition to a desegregated method of operation.

11. Judgment should again be reserved, for the present, on defendants' motions to strike and to dismiss certain portions of the complaint relating to segregated teacher and personnel assignment, and on the matters raised in the complaint which are involved in said motions, pending submission of further memoranda and argument of counsel.

12. The prayer of the plaintiffs for injunctive relief should be denied, except for the matters as to which judgment is reserved.

JUDGMENT

It is accordingly ORDERED, ADJUDGED and DECREED as follows:

1. That the plan submitted by the County Board of Education of Davidson County, Tennessee, is approved, except in the following particulars:

a. Compulsory segregation based on race is abolished in Grades One through Four of the Davidson County Schools for the Second Semester of the 1960-61 school year beginning January 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Five in September 1961, Grade Six in September 1962, etc.

b. As respects the summer classes attended by outstanding students, there will be no segregation based on races, and notice of such will be immediately given by the School Board to all teachers in the Davidson County school system, both Negro and white, of the availability of these classes.

c. The Davidson County School Board will, prior to the beginning of the Second Semester of the 1960-61 school year, and prior to the beginning of each school year thereafter, give specific notice to the parents of all school children of the zone in which their children fall for the purpose of attending classes.

2. The prayer of the plaintiffs for injunctive relief be, and the same is hereby denied, except with regard to those matters as to which judgment is hereinafter reserved.

3. Jurisdiction of this case is retained by the Court throughout the period of transition.

4. Judgment is reserved on the question of the motion to strike and those portions of the motion to dismiss not

hereinbefore overruled, and on the matters raised in the complaint which are involved in said motions.

To the foregoing action of the Court in approving the plan submitted by defendants and in denying plaintiffs' prayer for injunctive relief, the plaintiffs except.

This the 23rd day of November 1960.

WM. E. MILLER
United States District Judge

District Court Findings of Fact, Conclusions of Law and Judgment

Filed: January 24, 1961

This cause came on to be heard before the Honorable William E. Miller, District Judge, without the intervention of a jury, on January 10, 1961, upon the entire record, and especially upon the motion for further relief and the motion for new trial and for appropriate relief heretofore filed by plaintiffs, upon the merits of the cause as to the issues heretofore reserved by the Court, upon the motion to intervene in the cause filed by Porter Freeman, individually and in behalf of others, the testimony of witnesses heard in open court, and briefs and arguments of counsel, from all of which the Court finds and holds as follows:

Findings of Fact

1. With respect to the notices furnished by the defendants to parents of school children affected by the desegregation plan heretofore approved and the parents of all other children attending the schools in Davidson County, the Court finds that such notices are not confusing or misleading and further finds that there has been no showing of any confusion or misleading as a result of the form of the notices.

2. The Court finds that to grant the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr. and Benjamin Grover Maxwell to be admitted to schools as exceptions to the plan approved by the Court would in effect destroy the plan in this locality.

3. The Court finds that teachers and sustaining personnel are assigned to the schools based upon their particular aptitude, qualifications, background and other factors, all

of which are considered by the Board, and that one of these factors has been race.

4. The difficulties and problems which will be encountered in making the transition from a segregated system to a nonsegregated system would be enhanced and complicated if the Court should at this time require the assignment of teachers and supporting personnel in the schools of the system on a basis different from that which has heretofore been followed. It would in all probability lead to a situation where a plan which would otherwise be successful and would operate smoothly and harmoniously would be impaired and rendered unworkable.

CONCLUSIONS OF LAW

1. The Board of Education acted in good faith in preparing the notices to parents under the desegregation plan and in mailing and distributing them. The School Board and the attorney representing the School Board and all of the defendants acted in good faith in undertaking to carry out the order of the Court and the Court holds that they did so in substantial effect.

2. The notices to parents heretofore furnished by defendants to said parents under the desegregation plan were adequate. The Court finds no objection to them.

3. The notices to parents should be given to those who are affected by said plan of desegregation and not to anyone else, but the form of the notice in the future should be submitted to opposing counsel in advance of its mailing, giving them sufficient time to file objections with the Court;

and the Court will impose that requirement, believing that it is reasonable.

4. With respect to the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, to be admitted to schools as exceptions to said desegregation plan, the Court is of the opinion that to grant such exceptions would be in effect to invite the destruction of the very plan which the Court has held is for the best interest of the school system of Davidson County. It is not a plan which is designed to deny the constitutional rights of anyone. It is a plan which is designed to effect an orderly, harmonious, and effective transition from a racially segregated system to a racially nonsegregated system of schools, taking into account the conditions existing in this particular locality. And the Court cannot see how these individual plaintiffs who brought this action are or would be entitled to any different treatment from any other children who attend the schools of Davidson County and are members of the class represented by the plaintiffs.

5. With respect to the issue reserved by the Court on the merits, as to whether or not there is any violation of the rights of the plaintiffs or of those represented by the plaintiffs where teachers are assigned in the County School System on the basis of race or where race is used as a factor in making assignments of teachers, the Court cannot go so far as to agree with the argument that this question has been finally settled by the decision in the Brown cases. But the Court does entertain the view that this question is a serious question under the Equal Protection Clause of the Fourteenth Amendment. Particularly is this true when

the Court considers the fact that a plan has been approved for Davidson County which includes a very liberal transfer provision. When this provision, although it is on a voluntary basis, is coupled with a policy (and the Court is not now finding that this policy exists in Davidson County) which would assign teachers on the basis of race, then a serious question is presented to the Court as to whether there is not actually being thereby perpetuated the very condition which the Supreme Court said could not be perpetuated, and that is a segregated system of public schools. The Court is required to view the matter in terms of the entire school system, and in terms of the quality of education which the students are entitled to receive.

6. The Court finds that it is not necessary to determine the question relative to the assignment of school teachers and other personnel at this time for the reason that the Court does not believe (even if it should now hold and declare that the plaintiffs do have the right to attend a school system where race is not one of the factors considered in the assignment of teachers) that an injunction should issue at this time.

7. In the opinion of the Court, it is the better and wiser course for the Court to follow, even if the foregoing rights were declared as contended for by the plaintiffs, to withhold the granting of an injunction until the plan has had an opportunity to operate for a substantial period of time. The school authorities should have the benefit of experience in dealing with the operation of integrated schools. For these reasons, in the exercise of the Court's discretion, the Court would deny injunctive relief in this respect at this time.

8. This case will remain on the docket of the Court, and the Court will retain jurisdiction of the case during the period of transition; and the question with respect to the assignment of teachers, principals, and sustaining personnel can be renewed by the plaintiffs at a later date, and will be taken up and considered at that time, after the plan has had an opportunity to be operated for a substantial period of time.

9. The motion to intervene filed by Porter Freeman individually and in behalf of others, is not well taken for the reasons, first, that it comes too late; second, that it is contrary to the plan which the Court has already approved; and third, that it contemplates putting into effect a plan which has specifically been held to be unconstitutional by this Court and by the Court of Appeals of the Circuit. For these reasons the motion to intervene is not well taken and will be denied.

JUDGMENT

It is accordingly ORDERED, ADJUDGED AND DECREED as follows:

1. That the relief prayed for in the motion for further relief filed by plaintiffs be and the same is denied, with the exception that the form of the notices to parents in the future are directed to be mailed by defendants to counsel for plaintiffs in advance of mailing, so as to give them sufficient time to file with the Court objections to the form of said notices.

2. The aforesaid notices to parents will be given to those who are affected by said plan of desegregation heretofore approved by the Court and not to anyone else.

District Court Findings of Fact, Conclusions of Law and Judgment, January 24, 1961

3. The motion for a new trial and for appropriate relief filed by plaintiffs is overruled and denied.

4. Injunctive relief with respect to the issues heretofore reserved by the Court concerning assignment of teachers, principals, and sustaining personnel in the schools on the basis of race is denied at this time; and the Court further reserves ruling with respect to the assignment of teachers and other school personnel, including the right of school children or their parents to raise such question.

5. This case will remain on the docket of the Court, and the Court will retain jurisdiction of the case during the period of transition from a racially segregated to a racially desegregated school system. The question with respect to assignment of teachers, principals, and sustaining personnel may be renewed by the plaintiffs at a later date. It may be taken up and considered at that time after the plan has had an opportunity to be put into operation for a substantial period of time.

6. The motion to intervene filed in this cause by Porter Freeman is overruled and denied.

To the foregoing action of the Court in denying their motion for further relief and their motion for new trial and for appropriate relief, and in denying the relief prayed for in the complaint with respect to said issues heretofore reserved by the Court, the plaintiffs respectfully except.

This the 24 day of January, 1961.

WM. E. MILLER
United States District Judge

Opinion of Sixth Circuit

No. 14607

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HENRY C. MAXWELL, JR., ET AL.,

Plaintiffs-Appellants,

v.

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENN., ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

Decided April 4, 1962.

Before: MILLER, Chief Judge, CECIL, Circuit Judge, and DARR, Senior District Judge.

CECIL, Circuit Judge. This is an appeal from an order of the United States District Court for the Middle District of Tennessee concerning the desegregation of the public school system of Davidson County, Tennessee. This is the county in which the city of Nashville is located.

The appellants are Negroes and citizens of the United States and Davidson county. The adult plaintiffs are parents or guardians of the infant plaintiffs and reside with them in Davidson county. The infant plaintiffs are

school children who have been attending the public schools of Davidson county and who can satisfy all of the requirements for admission to the public schools operated by the defendant County Board of Education. The action was brought in the District Court by the plaintiffs, as a class action for themselves and on behalf of all others similarly situated.

The appellees are the County Board of Education, sued as a corporate or continuous body or entity, the individual members thereof, sued in their official capacity and as individuals, and the Superintendent of Schools, sued in his official capacity and as an individual.

The parties will be referred to hereinafter, respectively, as plaintiffs and defendants.

By this appeal three of the named infant plaintiffs seek a reversal of an order of the District Court denying them admission to certain schools heretofore denominated "white" schools. It is conceded that they live nearer to the schools to which they seek admission than they do to the so-called "Negro" schools which they are required to attend. It is also admitted that they were denied admission to these schools by reason of their race or color and that if they had been white children their requests would have been granted. The trial judge denied these plaintiffs admission to the schools to which they requested transfers.

He refused to approve the board's plan for a step-by-step, grade-a-year plan of desegregation, but modified it so as to require four grades to be desegregated as of January 1, 1961. This made the schools in Davidson county, outside of and contiguous with the city of Nashville, operate on a parallel basis with the city. As of now, five grades are desegregated.

The plan as approved included a transfer feature which is the same as the one in the Nashville plan. It provided that some of the valid conditions of transfer would be the following: "a. When a white student would otherwise be reuired to attend a school previously serving colored students only. b. When a colored student would otherwise be required to attend a school previously serving colored students only. c. When a student would otherwise be required to attend a school where the majority of students in that scho or in his or her grade, are of a different race."

Two questions are presented on this appeal. One, that the constitutional rights of some of the named plaintiffs are being violated in denying them the privilege of immediate transfer to schools that are nearer their homes than the ones they are required to attend, solely on the ground of race or color. Two, that the transfer feature of the plan violates the Fourteenth Amendment to the Constitution, for the reason that it provides for transfers to be made solely on the basis of race or color.

The same questions were decided in our opinion in *Josephine Goss, et al., Appellants* v. *The Board of Education of the City of Knoxville, et al., Appellees*, No. 14425, decided April 3, 1962. —— F. 2d ——.

In that case we said, on the first question: "As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan."

On the second question, we said: "We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. . . . A similar transfer plan was approved by this Court in *Kelly* v. *Board of Education of City of Nashville*, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924. We adhere to our former ruling with the admonition to the Board that it cannot use this as a means to perpetuate segregation."

Reference is hereby made to the *Knoxville* case for our full discussion on these questions. There is virtually no dispute on the pertinent facts of this case as found by the trial judge. We think the law, as applied by him to these facts, is in accord with the spirit and specific requirements of the pronouncements of the Supreme Court on the subject. *Brown* v. *Board of Education*, 347 U. S. 483; *Brown* v. *Board of Education*, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1. Judge Miller's Findings of Fact and Conclusions of Law are reported at —— Fed. Supp. ——.

For the reasons stated herein and in the *Knoxville* opinion, and upon the Findings and Conclusions of Judge Miller, the judgment of the District Court is affirmed.

Judgment of Sixth Circuit

April 4, 1962

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ LESTER L. CECIL
United States Circuit Judge